UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,	:	
Plaintiff,	:	**1:10-CV-0513 (NAM/RFT)**
-against-	:	
MATTHEW JOHN RYAN and PRIME RATE AND RETURN, LLC, individually and doing business as AMERICAN INTEGRITY FINANCIAL CO.,	:	
Defendants.	:	

PLAINTIFF'S AND RECEIVER'S JOINT MEMORANDUM OF LAW CONCERNING THE INADVISABILITY OF A BANKRUPTCY FILING

Plaintiff Securities and Exchange Commission (the "Commission") and Paul Levine, Esq., the Court-appointed Receiver over defendant Prime Rate and Return LLC ("Prime Rate"), respectfully submit this joint memorandum of law as directed by the Court in its Order dated May 3, 2011 ("Order"). For the reasons set forth below and in the Receiver's accompanying affidavit, the Commission and the Receiver respectfully submit that the substantial costs and likely delays of a bankruptcy proceeding for Prime Rate render any such proceeding inadvisable now and in the future.

STATEMENT OF RELEVANT FACTS

Unlike a bankruptcy proceeding in which there are substantial funds to distribute to creditors, Prime Rate's assets are unlikely to be worth more than $160,000. (Affidavit of Receiver with Regard to Bankruptcy Issues ("Receiver Aff.") ¶¶ 6.k – 6.l.) That is likely to be the total amount available to distribute not only to victims of defendant Matthew Ryan's Ponzi scheme and other creditors of Prime Rate, but also to compensate the Receiver and his law firm,

who have yet to be paid. (*Id.*) Ryan has already pleaded guilty to securities fraud and admitted that he took more than $4.8 million from investors, of which he used more than $1.6 million for his own and Prime Rate's expenses. *See United States v. Ryan*, Case No. 10-CR-319 (NAM), Plea Agreement (Docket Entry No. 9) ¶¶ 5.l & 5.m (Feb. 22, 2011). Prime Rate's remaining assets will not be enough to provide even a return of ten cents on the dollar to the victims of Ryan's Ponzi scheme.

Because of its cost, a bankruptcy proceeding for Prime Rate would substantially reduce even the small amount available to compensate victims and other creditors. (Receiver Aff. ¶¶ 6.a – 6.h.) A bankruptcy proceeding would likely cost more than $50,000 – almost one-third of Prime Rate's expected assets before distribution – due to legal and other fees, including the fees of the Office of the United States Trustee and additional Receiver fees for administrative costs such as the filing of monthly reports with the Trustee's Office. (*Id.*)

A bankruptcy proceeding would also likely further delay any eventual distribution to victims and other creditors. (*Id.* at ¶ 6.r.) Many of Ryan's victims are already over the age of 60. (Decl. of Simone Celio Jr. in Support of Pl.'s Emergency Application for an Order to Show Cause, TRO and Other Relief ¶ 13.)

ARGUMENT

I. Liquidation Through the Receivership Is Preferable In This Case to Bankruptcy.

Although the Second Circuit has expressed a "preference against the liquidation of defendant corporations through the mechanism of federal securities receiverships, as opposed to through the bankruptcy courts," it has "never vacated or modified a receivership order on the ground that a district court had improperly attempted to effect a liquidation." *SEC v. Malek*, 397 Fed. Appx. 711, 714, 715 (2d Cir. Oct. 25, 2010) (quoting in part *SEC v. American Bd. of Trade,*

Inc., 830 F.2d 431, 437 (2d Cir. 1987)). The Second Circuit has instead routinely approved the district courts' discretion in liquidations and distributions conducted through receiverships in Commission enforcement proceedings. *See, e.g., Malek*, 397 Fed. Appx. at 714-16; *SEC v. Credit Bancorp, Ltd.*, 290 F.3d 80, 85-91 (2d Cir. 2002). In this case, the costs of a bankruptcy proceeding would reduce the assets available to compensate the victims of Ryan's Ponzi scheme by approximately one third, and the bankruptcy process would likely delay any distribution to investors. Unlike a case where there are substantial unencumbered monies to distribute for which bankruptcy may lend a framework, a bankruptcy here would serve only to further burden the administration of the very limited funds the Receiver has and hopes to marshall. Under these circumstances, a liquidation and distribution by the Receiver with this Court's approval is greatly preferable to a long, costly bankruptcy proceeding for an entity with minimal assets.

Prime Rate is unlikely to have more than $160,000 available for distribution to defrauded investors and other creditors. A bankruptcy proceeding costing at least $50,000 will eliminate approximately a third of the pool of funds available for distribution. In a receivership estate with significant assets, the time and expense of a bankruptcy proceeding might be of little consequence. Here, the receivership estate has minimal assets and the defrauded investors include many senior citizens on fixed incomes who would benefit by obtaining any distribution as soon as possible. *See Malek*, 397 Fed. Appx. at 715 (approving liquidation through receivership where receiver had found that "the initiation of bankruptcy proceedings would 'increase the administrative costs to be borne by the receivership estate,' [and] would cause victims to 'wait significantly longer before receiving any payments'"); *see also SEC v. TLC Invs. & Trade Co.*, 147 F.Supp.2d 1031, 1036 (C.D. Cal. 2001) (finding liquidation through district court receivership appropriate in lieu of bankruptcy where the "entities' liabilities were greater

than their assets and because ongoing management alone will drain money out of the estate, money that otherwise could be returned to investors").

Furthermore, the flexibility this Court can exercise over any eventual distribution will ensure that defrauded victims and other creditors, should they choose to make claims, are compensated as equitably as possible.[1] *See Malek*, 397 Fed. Appx. at 715 (approving distribution plan where receiver noted that bankruptcy proceedings would cause receivership estate to forfeit the 'latitude enjoyed by courts overseeing equity receiverships to carefully craft a particularized plan to achieve the most equitable distribution possible'").

II. A Bankruptcy Filing Is Unlikely to Be Advisable in the Future.

The Commission and the Receiver do not anticipate that a bankruptcy filing will be advisable in the future, because the additional monetary and temporal costs of a bankruptcy filing will remain high without any corresponding benefit. The Commission and the Receiver anticipate that the Receiver will liquidate the estate as soon as possible to relieve the estate of the administrative costs of maintaining the real property and to enable prompt distribution of the estate's remaining assets and that the Receiver will then create a proposed distribution plan, in consultation with the Commission. Forcing Prime Rate into a bankruptcy proceeding at a later time – *e.g.*, for purposes of distribution through the bankruptcy court – will increase the administrative costs, thereby reducing the victims' recoveries, and delay any distribution. Furthermore, the Receiver has already determined that avoidance actions available in a bankruptcy proceeding – preference or fraudulent conveyance claims – are not practical or cost-effective. (Receiver Aff. ¶ 6.j.) Finally, the immediate and longer-term requirements of a bankruptcy involving the administration of real estate will make a bankruptcy largely

[1] Most, if not all, of the secured lenders (those holding mortgage liens on the real property being administered) will likely have unsecured deficiency claims that they may or may not choose to pursue.

impractical. A Court-approved distribution by the Receiver will therefore cost substantially less than a bankruptcy distribution and enable substantially more money to be distributed to the victims of Ryan's Ponzi scheme, without any real disadvantage.

CONCLUSION

For the reasons stated above, the Commission and the Receiver respectfully submit that Prime Rate should not file a bankruptcy petition.

Dated: New York, NY
June 2, 2011

SECURITIES AND EXCHANGE COMMISSION

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